

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

77-7011

To be argued by
CAROLYN E. DEMAREST

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JEFF TRACHTMAN, Individually and by his
father, GILBERT M. TRACHTMAN,

Plaintiffs-Appellants-Appellees,

-against-

IRVING ANKER, Individually and in his
capacity as Chancellor of New York City
Public Schools, et al.,

Defendants-Appellees-Appellants.

On Appeal From A Judgment of the United
States District Court for the Southern
District of New York

BRIEF OF DEFENDANTS-APPELLEES-APPELLANTS

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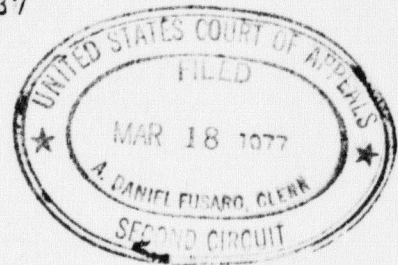


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BRIEF OF DEFENDANTS-APPELLEES-APPELLANTS

Statement

This action for a declaratory judgment and injunctive relief was brought pursuant to 42 U.S.C. §1983 by Jeff Trachtman, a student at Stuyvesant High School, and his father, to obtain an order directing defendant-appellee school authorities to permit the distribution of a sex survey questionnaire to all students at Stuyvesant and to permit the publication of a student article in the school newspaper based upon responses to the questionnaire.* Jurisdiction is predicated upon 28 U.S.C. §§1343, 2201.

*The complaint also demanded that defendants-appellees be restrained from pursuing a "practice of employing an unconstitutional system of prior review of literature". This issue was not litigated nor decided in the Court below (A21) and has not been raised on appeal. It is, therefore, deemed abandoned.

In a memorandum opinion, Judge Motley found that, although students of 13 and 14 years of age might foreseeably be emotionally damaged by a confrontation with the questions posed in the questionnaire (A10),* the First Amendment rights of the student plaintiff had been violated by the refusal to permit distribution to upper class students (A5).

By order dated December 15, 1976, the United States District Court for the Southern District of New York (Motley, J.), directed that a plan be formulated by a group consisting of a student representative, a parent representative and a representative of the Board of Education, to distribute, collect and publish the results of the questionnaire (A19). Defendants-appellees were enjoined from prohibiting the publication of the proposed article to be based upon the results of the survey (A5-6).

On December 30, 1976, Judge Motley ordered that her order of December 15, 1976 be stayed pending appeal. Defendants-appellees (hereinafter, "appellees") promptly filed a notice of appeal the same day, followed shortly thereafter by the notice of cross-appeal of plaintiffs-appellants (hereinafter, "appellants").

*Numbers in parentheses, preceded by an "A", refer to pages of the Appellants' Appendix unless otherwise noted.

Questions Presented

1. Does the First Amendment protect the right of expression of a high school student so as to entitle him to use the facilities of a public school for the purpose of investigating the sexual attitudes and experience of his peers and to publish his findings in a school-sponsored newspaper?

2. Was the decision of the Court below in distinguishing between students of 13 or 14 years of age and "upper class" students clearly erroneous?

3. Did the Court below err in enjoining appellees from preventing the publication of an article which has not yet been written?

Facts

Appellant Jeff Trachtman is a senior student at Stuyvesant High School in New York City and editor-in-chief of that school's newspaper, "The Stuyvesant Voice" (A30-31). Together with one of his staff members, Robert Marks, he devised a plan to survey the sexual attitudes of his fellow students and report the results in an article to be published in the newspaper (A32).^{*} Initially it was anticipated that the "research" for the article would be done through personal interviews to be conducted by a staff of five student researchers; and the proposal, as submitted to Stuyvesant's principal, Gaspar Fabbricante,

^{*}Robert Marks is no longer a student, having graduated from Stuyvesant last June. He has never been a party to this action.

and to Sanford Gelernter, Administrator of Student Affairs, in December, 1975, included the technique of face to face encounters between students (A90-91; A111, see Record on Appeal, Exhibit B to Gelernter Affidavit in Opposition for a copy of the Proposed Survey). This technique would not preserve even a minimum level of confidentiality (A114). Marks himself acknowledged that neither the student's, nor his parents', written consent would be obtained in advance (A90).

Based upon a policy of strict adherence to Board of Education regulations respecting research in the public schools, and particularly a rule requiring written parental consent prior to administering questions to students,* on December 17, 1975, Mr. Gelernter denied permission to conduct the survey (A56).

In response to Mr. Gelernter's denial of permission, Marks and the student appellant joined in seeking a reversal of his decision by appeal to appellee Anker, Chancellor of the New York City School System (A57). It was at this point

*The Board of Education "Handbook for Research Applicants" (A77 et seq.) sets forth the procedure to be followed by qualified agencies "such as medical and psychotherapeutic centers, civic agencies and university research bureaus" and "candidates for graduate degrees" (A78) in obtaining permission to conduct research involving the New York City Public School System. All prospective researchers are advised: "WRITTEN PARENTAL CONSENT MUST BE OBTAINED BY THE INVESTIGATOR IN ORDER TO INSPECT PUPIL RECORDS, ADMINISTER QUESTIONNAIRES, HOLD INTERVIEWS, ADMINISTER TESTS, OR TO INVOLVE STUDENTS IN ANY MANNER." Parental consent must be obtained before research is begun and the request form "must contain explanations of purpose" (A81, A85).

that the written questionnaire and cover letter were first submitted for review (A52-55). These documents are the subject of this appeal.

Failing a reply from Dr. Anker, Marks and the student appellant again joined in an appeal to Harold Siegel, Secretary of the Board of Education (A58). On February 27, 1976, Mr. Siegel advised Jeff Trachtman that the Board of Education had considered the matter and determined that the sex survey could not be approved (A59-60). The Board's decision was based largely on the failure to obtain informed consent of both students and parents, and the inability to preserve confidentiality as required under the rules generally applicable to research involving human subjects. Stressing the sensitive and personal nature of the proposed survey, the Board stated: "Freedom of the press must be affirmed; however, no inquiry should invade the rights of other persons" (A60).

This determination was followed by a letter, dated March 31, 1976, from appellants' present counsel, Martin Berger, to Harold Siegel requesting reconsideration of the Board's decision (A61-63). On April 7, 1976, Mr. Siegel responded that he would be willing to discuss the matter further, but indicated that the Board felt that research projects of the nature proposed must be governed by the rules contained in the "Handbook For Research Applicants" whether the researchers are students or outsiders (A64-65). Mr. Siegel stated he believed the legal

issue to be a question of the permissible latitude in making "professional judgments as to the potential harmfulness of the material to the population to which it would be addressed." (A65).

This action was commenced by the service of a summons and complaint on August 30, 1976. On September 23, 1976, appellants brought an order to show cause in the District Court for the Southern District of New York seeking a declaration of the rights of the parties and a preliminary and permanent injunction against restraining the distribution of the questionnaire and the publication of the results thereof (A41-42). At the hearing on the motion, the Court decided to consolidate the motion for a preliminary injunction with a hearing on the merits. Both sides agreed to submit their evidence in affidavit form (A21).

Appellants submitted the affidavit of Martin Berger, attorney for appellants (A43-49), affidavits from both appellants, Gilbert Trachtman offering his expert opinion as a practicing psychologist (A50-51; A92-100), and affidavits from three other experts in the field of psychology: Victor Elkin, a certified school psychologist (A107-109); Max Siegel, professor and program head of Graduate Program of School Psychology at Brooklyn College (A104-106); and Harry Gilbert, licensed psychologist and professor of education at Fordham University (A101-103).

Appellees submitted, in opposition, the affidavits

of their attorney, Robert Deutsch (A67-71), Research Assistant for Educational Evaluation, Jacob Abramson (A124), Administrator of Student Affairs, Sanford Gelernter, (A11-116), and the affidavits of four experts in the fields of psychology and psychiatry: Florence Talper, psychologist and Clinical Professor at New York University School of Medicine (A125-127); Aaron Esman, Chief Psychiatrist at the Jewish Board of Guardians (A128-130); Vera Paster, psychologist and Assistant Director of the Bureau of Child Guidance (A75-76, A131-135); and Ingram Cohen, Chief School Psychiatrist of the Bureau of Child Guidance and a practicing psychiatrist (A72-). In addition, appellees offered the affidavit and report of Anthony J. Polemeni, Director of the Office of Educational Evaluation of the New York City Board of Education (A117-123).

Annexed to the affidavit of Sanford Gelernter were several exhibits which demonstrate that sex and sexuality are included in the curriculum at Stuyvesant and that professionally-supervised peer group discussions of sex are sponsored by the school (Record on Appeal, Exhibits E, F, G, H, I, J). Stuyvesant's longstanding recognition of the need for discussion of sex among peers is acknowledged by Dr. Trachtman (A93).

In response to appellees' evidence, appellant Gilbert Trachtman submitted a supplementary affidavit in which he rebutted the testimony of appellees' experts (A136-143). Mr. Berger also submitted a supplementary affidavit (A145), to which is appended the statement of Adam Mung, Chief

Psychologist at St. Luke's Hospital Center (A148). A final reply affidavit was submitted on behalf of appellees by Harold Siegel, Secretary to the Board of Education (150-154). The substance of the evidence will be discussed in conjunction with the legal argument.

Opinion Below

Judge Motley stated:

"The question is whether defendants deprived the student plaintiff of his First Amendment right to freedom of expression when they refused him permission to distribute his questionnaire" (A5).

She decided:

"The court holds that defendants violated the First Amendment rights of the plaintiff student when they refused permission to distribute the questionnaire to upper class students. The court further holds that defendants cannot refuse permission to publish the results in the school newspaper" (A5-6).

It is the above ruling from which the appellees-appellants have appealed.

Following a lengthy analysis of the evidence and a general review of the law, Judge Motley found that distribution of the questionnaire would present a substantial risk of psychological damage to students as young as 13 and 14 years of age, and held: "Defendants, therefore, did not violate the Constitution in prohibiting distribution at this level" (A10). Appellees agree with this aspect of Judge Motley's decision.

Citing the rule enunciated by the Supreme Court in Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511 (1969), that the abridgment of First Amendment rights of students can only be justified by a showing that the subject restrictions are "necessary to avoid material and substantial interference with schoolwork or discipline..." (A8), the Court proceeded to distinguish the instant controversy from the application of the disruption theory:

"The question in this case, however, is markedly different: To what extent will the distribution of a questionnaire dealing with sexual attitudes infringe on the rights of the students and their parents, and what is the potential for psychological harm as a result of the distribution? Tinker did not deal with this specific question but focused on the 'physically' disruptive effects of students wearing black armbands in opposition to the Viet Nam War. However, Tinker did not delineate the circumstances under which the school authorities may proscribe students' First Amendment rights. If defendants can prove there is a strong possibility the distribution of the questionnaire would result in significant psychological harm to members of Stuyvesant High School, then the distribution could be denied. See Shanley v. Northeast Ind. School Dist., 462 F. 2d 960, 971 (5th Cir. 1972) (the standard is the 'reasonableness' of the restrictions)" (A9).

Having established that appellees could legally restrict First Amendment rights of students where there exists "a strong possibility [of] significant psychological harm," the Court evaluated the evidence to determine the

sufficiency of the risk. Judge Motley agreed with appellees that a confrontation with pointed sex-related questions would be likely to produce apprehension and possible instability in students who are emotionally immature and whose sexual identities are "in a state of rapid development." She found, however, "that this reasoning applies only to students as young as 13 and 14 years of age" (A10).

Citing Grayned v. City of Rockford, 408 U.S. 104, 116-117 (1972), the Court ruled: "When students' First Amendments [sic] rights are asserted, the reasonable restrictions which are imposed must be the minimum necessary to protect the need for discipline and to protect the interests of the students" (A11). Judge Motley found the evidence of harm to be "unconvincing with respect to the junior and senior students", finding, instead, that the questionnaire might even be beneficial to this group (A11). She reasoned:

"Upper class students who are sexually immature or who have certain conflicts would be more likely to resolve these problems if they are faced, as a result of peer pressure, with the basic questions, and if they are simultaneously made aware of the fact that many other students have similar problems. The distribution of the questionnaire and the publication of the results in the Voice will make it clear that the questions asked are the concerns of many, and that the problems which a student may face are not unique to himself.

"In addition to this court's finding

that, with respect to the older students, the psychological benefits of the survey far outweigh any harm, there are also significant educational benefits to be gained from this student project. Many of defendants' affiants objected to the unscientific nature of the survey claiming that the questions are a hodge-podge and that the results would prove nothing. This argument is beside the point. The value to the scientific community is not relevant. What is important here is that a number of students took the initiative to research and design a survey with the help of adults. This type of independent investigation should be encouraged and applauded, for an integral goal of our educational system is to stimulate inquiry as well as to impart knowledge" (A12-13).

On the authority of this Court's decision in Eisner v. Stamford Board of Education, 440 F. 2d 803 (2d Cir., 1971), Judge Motley ruled, "defendants can ban the distribution of literature without relying on an existing 'rule'" (A15). She rejected as inapplicable to students the guidelines set forth in the "Handbook for Research Applicants" (A14-15). The Court reasoned that students wishing to do research like that at issue here should not be "burdened" with the requirement of conforming to certain standards. "Such a standard would frustrate even the brightest and most curious of students" (A15).

Noting that some students "may be tempted to forge 'stubborn' parents' signatures," and that the paperwork involved in obtaining the consents "could lamentably reach adult proportions," the Court found the requirement of parental consent to be an "undue burden" which "would seriously complicate - and perhaps frustrate - the research

project of the student plaintiff" (A16). The Court recognized the parents' interest in determining what their children are exposed to in school, but, nevertheless, found the subject survey, despite its sensitive nature, to have been so responsibly designed and written "that parental consent is not required under the circumstances" (A16).

Based upon the expert evidence, the Court concluded, however, that the younger children at Stuyvesant might be disturbed by a confrontation with some of the questions in the survey. For those as young as 13 or 14, exposure to a comparison of their sexual attitudes and experience with that of their peers may result in significant harm (A17). Judge Motley ruled, therefore, that:

"The school authorities certainly need not wait until the harm has occurred before restricting First Amendment rights; they can take reasonable precautions to prevent the possibility of harm. Butts v. Dallas Ind. School Dist., 436 F. 2d 728, 731 (5th Cir. 1971). The Board, therefore, may continue to deny plaintiffs permission to distribute the questionnaire to the 9th and 10th grade students." (A17-18).

Reciting the rule that courts should minimize their involvement in school administration, Judge Motley proceeded to outline a plan for school supervision of the distribution of the questionnaire (A18). The plan calls for a panel of negotiators to be selected by the parties. The negotiators shall select a faculty or administration member to oversee distribution, collection, and publication. School personnel are to be available following distribution

and publication to meet with students for both public and confidential discussion. The plan is to be reviewed by the Court through a formal hearing. If the parties are unable to agree on a plan, "the court will draw its own plan" (A19-20).

POINT I

REASONABLE LIMITS MAY BE PLACED UPON
THE EXERCISE OF FIRST AMENDMENT RIGHTS
BY PUBLIC HIGH SCHOOL STUDENTS. THE
RIGHTS OF THE INDIVIDUAL MUST BE WEIGHED
AGAINST THE WELFARE OF ALL.

The case at bar presents an issue of first impression. Unlike other cases in which the First Amendment rights of high school students have been litigated, this case does not merely involve the communication from one group of students to another of a political idea, be it the war in Vietnam (Tinker v. Des Moines, Indep. Commun. School Dist., supra), or criticism of the school administration (Scoville v. Board of Educ. of Joliet Township H. School Dist. 204, 425 F. 2d 10 (7th Cir., 1970), cert. den. 400 U.S. 826 (1970)). Rather, the instant controversy is distinguishable in two key respects: it relates to a very personal and private aspect of life, itself protected under the Constitution (Griswold v. Connecticut, 361 U.S. 479 (1965)) which is a particularly delicate subject for persons of high school age; and, the proposed expression necessarily requires the active participation of those to whom it is addressed. Thus, the issue is not merely, as Judge Motley perceived, "whether defendants deprived the student plaintiff of his First Amendment right to freedom of expression" (A5), but is also whether the proposed exercise of appellants' rights will violate the rights of all other students to privacy* and protection from possible psychic injury within

*See generally, Note, On Privacy: Constitutional Protection for Personal Liberty, 48 N.Y.U.L. Rev. 670, 671-705 (1973).

the confines of a public school. Also at issue are the rights of parents to be secure in the knowledge that the school, acting in its capacity as a substitute parent, will so order and control the environment of their children to prevent unnecessary physical or emotional harm when such danger is reasonably foreseeable. See Sullivan v. Meade Indep. School Dist. No. 101, 530 F. 2d 799, 804 (8th Cir., 1976).

Finally, critical to this appeal is the question of the standard of care to be exercised by appellees in performing their duty toward the children in their charge and toward the society as a whole. Are the First Amendment rights of high school students so inviolate that nothing short of chaos in the classroom warrants censorship of student expression. Or do appellees have a duty both to parents and to the children themselves to exercise reasonable discretion in limiting the child's exposure to hazardous experiences within the school environment.

(1)

Appellants have correctly observed (at p. 2, appellants' brief) that appellees do not claim the survey herein to be obscene or otherwise unprotected based upon its content. Nor do appellees allege that physical disruption of the school will result from distribution or publication. Appellees have not asserted that a particular rule has been systematically enforced against appellants. The "Handbook for Research Applicants" (A77 et seq.) has been offered

as evidence of the guidelines established and applied generally in order to protect students and their parents from invasions of their privacy* in the name of scientific research. Although appellees do not agree with Judge Motley that the application of the standards for research set forth in the Handbook would unduly burden student initiative, the presence of a rule is not an issue in this case.

Both appellants and appellees agree with Judge Motley's well-supported statement that the First Amendment rights of students are not co-extensive with those of adults (A8)**, and may be abridged where the restrictions sought to be imposed are reasonable (A9). See Healy v. James, 408 U.S. 169, 203 (1972) (Rehnquist, J., concurring); Nitzberg v. Parks, 525 F. 2d 378, 382 (4th Cir., 1975); Shanley v. Northeast Indep. School Dist., supra, 462 F. 2d at 971; Burnside v. Byars, 363 F. 2d 744 (5th Cir., 1966). The issue is, therefore, whether appellees met that standard in evaluating the risks to the students of permitting distribution of the survey.

*The constitutional right to privacy is clearly established in matters relating to sex and procreation (Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, supra; Roe v. Ingraham, 480 F. 2d 102 (2d Cir., 1973), prob. juris. noted sub nom. Whalen v. Roe, 424 U.S. 907 (1976)), and has been expressly extended to minors of high school age (Planned Parenthood of Central Missouri v. Danforth, 96 Sup. Ct. 2831, 2844 (1976); Population Services International v. Wilson, 398 F. Supp. 321 (S.D.N.Y., 1975), prob. juris. noted sub nom. Carey v. Population Services International, 96 Sup. Ct. 2621 (1976); Foe v. Vanderhoof, 389 F. Supp. 947 (D. Col., 1975); Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa., 1973)).

**This is particularly true where the content of the subject expression relates to sex. Ginsberg v. New York, 390 U.S. 629, 637 (1968).

(2)

It has been judicially recognized that alleged violations of First Amendment rights must be reviewed on a case by case basis, giving full consideration to the facts in each case, particularly the age or maturity of those to whom the proposed communication is addressed. Healy v. James, supra, 408 U.S. at 180; Quarterman v. Byrd, 453 F. 2d 54, 57 (4th Cir., 1971).

The critical importance of the school setting to a determination of First Amendment violations was aptly noted by this Court in Katz v. McAulay, 438 F. 2d 1058, 1061 (2d Cir., 1971): "Pupils are on school premises in response to the statutory requirement that they attend school for the purpose of formal education." In James v. Board of Education of Central District No. 1, 461 F. 2d 566, 573 (2d Cir., 1972), cert. den., 409 U.S. 1042 (1972), this Court again noted that public school students effectively comprise a "captive" audience. Justice Stewart, concurring in Ginsberg v. New York, articulated the relevance of this fact in deciding the permissible degree of prior restraint appropriate in such circumstances:

"When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees

"I think a State may permissibly determine that, at least in some precisely delineated areas, a child-like someone in a captive audience - is not possessed of that full capacity for individual

choice which is the presupposition
of First Amendment guarantees"
(Ginsberg v. New York, supra, 390
U.S. at 649-650).

A child, be he 13 or 17, frequently is neither secure enough nor mature enough to reject challenges with which he is unprepared to cope emotionally. See People v. Kahan, 15 NY 2d 311, 312 (1965) (Fuld, J., Concurring). It is obvious that although actual completion and submission of the questionnaire may not be mandatory, the decision whether or not to answer necessitates a reading of the questions and, presumably, at least a mental response thereto. It is this confrontation that appellees perceive as potentially harmful and have sought to avoid. Appellees agree with Mr. Justice Stewart that the First Amendment also secures the liberty to decide for oneself what to read and what to listen to.

Justice Stewart's observation is particularly relevant to this case in distinguishing the position of a student receiving a questionnaire within the confines of a school building and the same student indirectly confronted with pornographic literature being sold on the street. The child passing a newstand (See Judge Motley's decision at A8-9) can turn his head and walk away with impunity; even if he chooses to look or read, he is not required to relate the material to himself personally or to evaluate his own sexual behavior, much less compare himself or his standards with those of his fellow students.

Appellees believe that the distribution of appellants' questionnaire among high school students, in a school setting, would violate the constitutional rights of all other students to personal privacy and choice. The issue here requires, therefore, a weighing of the rights of the group to protection from potential psychological harm against the rights of an individual to investigate and express the attitudes of his peers about a very personal and emotionally-charged subject.

(3)

A recent decision in the Eastern District of Pennsylvania supports appellees' position. In Merriken v. Cressman, supra, 364 F. Supp. 916 (E.D. Pa., 1973), the school authorities had devised a drug prevention questionnaire to be administered to the students with the consent of their parents. The students could decline to answer the questionnaire even if their parents had consented, but the Court found that option to be as dangerous an alternative as compelling an answer since the refusal to respond would be likely to result in "scapegoating" by other students (364 F. Supp. at 915). (See also, Polemeni Report, A118-121). The Pennsylvania District Court found informed parental consent* and guaranteed confidentiality to be essential

*The care of children and the protection of their rights is, in the first instance, entrusted to the parent. Ginsberg v. New York, supra, 390 U.S. at 639; Prince v. Massachusetts, 321 U.S. 158, 166 (1944). Where the child is unable to assert his own rights effectively, it is the right and duty of the parent to do so.

to the protection of the students' right to privacy. In striking down the program as unconstitutional, the Court also cited the inadequacy of the non-professional staff to be employed in group therapy sessions as a defect critical to the protection of the students' rights.

Taken as a whole, the Merriken case represents an analog to the case at bar. Questions of the children's right to privacy, the lack of professional standards in invading that right, confidentiality, and the need for parental consent all played a significant role in the court's analysis in both cases. On each point, Judge Motley's conclusions diverged from those of the Pennsylvania court. Appellees submit that the Merriken case was correctly decided and should be followed by this Court in reversing Judge Motley's decision with respect to upperclassmen.

POINT II

THE FINDING OF POTENTIAL HARM ONLY TO
THIRTEEN AND FOURTEEN YEAR OLD STUDENTS
IS CLEARLY ERRONEOUS.

Although appellees recognize that under F.R.C.P. 52(a) the findings of the Court below may not be set aside unless clearly erroneous, it is our contention that no evidence in the record supports Judge Motley's decision to permit distribution to upperclass students while refusing distribution to thirteen and fourteen year olds. Furthermore, this Court is in the same position as was the trial

court with respect to evaluating the evidence since none of the testimony was presented orally, and no opportunity had for cross-examination.

(1)

None of the experts who offered their opinions of the potentially damaging effects of appellants' sex survey disputed that the students to whom the questionnaire is addressed are at a critical stage of personality development with respect to sexual identity. Even appellants' witnesses admitted that some students may experience conflict as a result of being exposed to the survey (A98; A103). The expert opinion on these two points clearly supports the reasonable conclusion that students at Stuyvesant, because of their age, are highly vulnerable to emotional trauma resulting from sexual encounters of any kind, be they mental, verbal or physical (see A122, A127; A129; A133). While this vulnerability may be more acute among younger children, none of the experts made a distinction between thirteen and fourteen year olds and fifteen to seventeen year olds sufficient to warrant the Court's decision to differentiate between these two groups in protecting their right to privacy. The evidence indicates, to the contrary, that chronological age does not necessarily correlate with emotional maturity (A122).

Judge Motley, in reviewing the evidence, apparently relied heavily upon the opinion of the appellant expert, Gilbert Trachtman, that the risk of

harm in distributing the questionnaire is insignificant compared to the influences in the street, and that the weaker, more immature members of the student body may actually benefit from the proposed confrontation (All-13). Appellees submit that Dr. Trachtman's objectivity and the weight of his expert opinion must be measured against his interest as party to this lawsuit.* However, even Dr. Trachtman does not state that no danger of psychic harm exists, nor that any potential danger somehow disappears in the transition from sophomore to junior status. In fact, Dr. Trachtman admits that a substantial number of children are likely to suffer anxiety about sex, but passes off the threat of increased anxiety from exposure to the survey as not significant compared to other sexual stimuli that may be available elsewhere (A94-95, A98). Unfortunately, appellees are not in a position to control the students' exposure to other influences which may or may not represent an equivalent threat to emotional stability. Dr. Trachtman's argument, in this respect, is, therefore, without merit.

*Appellees believe that the credentials of an expert witness are critical to a proper evaluation of the substance of his testimony. This is particularly true in the instant case where there has been no opportunity for cross-examination. Appellees, therefore, respectfully direct the attention of the Court to the resumes of their witnesses which were omitted from appellants' appendix. A resume was annexed as a exhibit to each affidavit to enable the Court to better evaluate the relative worth of each expert's opinion.

(2)

Much of the dispute among the experts centers around the scientific qualities of the survey as a research tool. Appellees agree with Judge Motley that "the value to the scientific community is not relevant" (A13). We urgently disagree, however, with both Judge Motley and Dr. Trachtman that the standards to be applied in formulating questions and evaluating the responses to the survey are not important. The results of the survey are presumably to be published in the school newspaper for all the students to read, whether they answered the questions or not. Because the survey is being represented as scientific research (and not merely an opinion poll), the published results will be received as truth. Whatever the results of the survey reveal is the behavioral norm of the majority at Stuyvesant will be accepted by the reader and will be applied as a measure of his own experience. That the questionnaire was not, in fact, scientifically structured to avoid false or misleading results may not be known to the impressionable adolescent reader. There is a significant danger that the highly subjective information called for cannot be objectively evaluated so as to formulate accurate conclusions (A114; A123, A129; A132). The impact of such information on the emotional security of an adolescent need not be reiterated.

Furthermore, while discounting the need for scientific controls in implementing the survey as unduly burdensome, the Court below, nevertheless, placed great emphasis upon the value of the survey as an educational tool in teaching students a technique of independent investigation (A13). Such determination is not only contradictory on its face, but is also irrelevant. No amount of educational value to the minority who wish to devise "research" projects using their fellow students as subjects can justify the flagrant invasion of the proposed subjects' right to privacy and emotional well-being. The "Handbook for Research Applicants" demonstrates the degree of care taken by school authorities as a matter of course in protecting students' rights even where the researchers are qualified professionals. Surely, students do not have unbridled license to pry into the personal lives and thoughts of their peers in the name of free expression regardless of the consequences.

(3)

Appellants have taken issue with the probability of psychological harm to an indeterminate number of children. They claim that appellees' decision to suppress the survey results in the "heckler's veto" or the "tyranny of the minority." This argument might be valid if a student's right to express his own opinion were the only issue. But what is truly at stake

here is the right of the majority not to be confronted with a potentially damaging demand from his peers to express his opinion and relate his experience possibly against his will.

In Merriken v. Cressman, supra, 364 F. Supp. 913 (E.D. Pa., 1973), the Court noted the need for informed consent from both student and parent based upon an accurate representation of all the negative aspects to be considered in answering the questionnaire. The appellants have stressed the anonymous and voluntary nature of the survey. Both the Merriken Court and appellees' witnesses have observed, however, that peer pressure under the particular circumstances herein may very well render a voluntary response impossible. Merriken v. Cressman, supra, 364 F. Supp. at 915; A121; A127.

Furthermore, the number of students who may actually suffer psychological harm is irrelevant. If there is a significant possibility that even one or two will be harmed, the risk is sufficient to warrant the appellees' decision to prohibit distribution. See Merriken v. Cressman, supra, 364 F. Supp. at 920. In Shanley v. Northeast Independent School District, supra, 462 F. 2d at 970, the Fifth Circuit Court of Appeals held that expression by high school students may be prohibited entirely if there is reasonable cause to believe that the rights of other students may be infringed.

(4)

Public school officials act as an arm of government; their chief function is to serve the purposes of the state in educating and protecting children to the end that they may grow into responsible, emotionally secure, productive citizens. The state's interest in protecting children from objectionable influences is undisputed. See Ginsberg v. New York, supra, 390 U.S. 629 (1968); Bookcase, Inc. v. Broderick, 18 NY 2d 71 (1966), App. dismiss., 385 U.S. 12 (1966).

Where there appears to be only a minimal abridgment of First Amendment rights based upon school authorities' reasonable perception of potential damage to children too young to protect themselves from foreseeable psychological harm resulting from exposure to the proposed communication, this Court has deferred to the expertise of the school administrators in establishing the necessary extent of censorship. Presidents Council, Dist. 25 v. Community School Bd. No. 25, 457 F. 2d 289 (2d Cir., 1972), cert. den. 409 U.S. 998 (1972). Like the District 25 case, the instant case involves the suppression of a particular item or format of communication. It is clear from the evidence that all aspects of the proposed subject matter may be freely discussed within the school, both formally as a part of the curriculum, and informally in peer group "rap" sessions.

This Court has recently held that, "The availability of alternative means of communication is a relevant factor in any case in which First Amendment rights are arrayed against asserted governmental interests." Connecticut State Federation of Teachers v. Board of Educ. Members, 538 F. 2d 471, 481 (2d Cir., 1976). Given the numerous alternatives for expression on the subject which are available both to the student appellant and to his fellow students within and without the school curriculum, and the clear potential for psychological harm, appellees submit they have met the standard for protection of appellant's First Amendment rights in the public school context.

(5)

It is a maxim of judicial dicta that the internal operation of public schools should be left to the professional judgment of local officials, who should be as free as possible from judicial intervention. Tinker v. Des Moines Indep. Commun. School Dist., supra, 393 U.S. at 507; Epperson v. Arkansas, 393 U.S. 97, 104 (1968); James v. Board of Educ. of Cent. Dist. No. 1, supra, 461 F. 2d at 573; Shanley v. Northeast Indep. School Dist., supra, 462 F. 2d at 967. Appellees submit that Judge Motley's decision violates this general rule. The school authorities declined permission to conduct a particular survey based upon specific defects

in appellants' proposal.* By ordering appellees to assist appellants in remedying some of these defects, the Court has become the overseer of the day to day operation of Stuyvesant High School and has deprived appellees of their right to exercise discretion in controlling the school environment. The District Court's decision in this respect presumably gives all students the right to demand the implementation of their ideas by school officials. School authorities will no longer be able to review a proposal upon its own merits, but must also speculate about possible means of remedying the defects. For this reason, appellees contend that the Court below erred in ordering the appellees to structure the implementation of appellants' survey so as to protect against inherent defects.

POINT III

THE ORDER ENJOINING REFUSAL TO
PERMIT PUBLICATION OF AN ARTICLE
IN THE SCHOOL NEWSPAPER IS AN
IMPROPER ABUSE OF DISCRETION.

The article proposed to be written following evaluation of the survey results has not yet been written. The merit and propriety of such article is, therefore, unknown. The hypothetical article may contain obscenity, libel or unnecessarily graphic detail. Allusions may be made to the identity of a respondent, for example,

*In fact, numerous attempts were made to negotiate with appellants regarding the content and format of the proposed questionnaire prior to initiation of this litigation (A124).

someone who is known to use a particular color ink or whose handwriting is unique. Such considerations are of legitimate concern in permitting publication in a public school. Shanley v. Northeast Indep. School Dist., supra, 462 F. 2d at 971. Appellees submit that the Court's order to permit publication, sight unseen, was premature and improper and should be reversed, at least until such article has been written and reviewed by school authorities.

CONCLUSION

THE DECISION OF THE COURT BELOW SHOULD BE MODIFIED TO PROHIBIT DISTRIBUTION OF THE SEX SURVEY TO ANY STUDENTS AT STUYVESANT AND THE INJUNCTION RESTRAINING APPELLEES FROM PROHIBITING PUBLICATION OF THE NEWSPAPER ARTICLE, VACATED.

March 18, 1977

Respectfully submitted,

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LEONARD KOERNER,
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AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.:

being duly sworn, says, that on the 18 day of MAR., 1977
 at No. 377 B'WAY in the Borough of MANH. in The City of New York, he served three copies
 of the annexed BRIEF, etc. upon MARTIN M. BERGER Esq.,
 the attorney for the OPP. ATTY. in the within entitled action by delivering
 three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and
 leaving the same with him.

Sworn to before me, this 18day of MAR., 1977

BRUCE S. GARNER
 Commissioner of Deeds
 City of New York - No. 4-1786
 Commission Expires May 1, 1978

